Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 01(F)-8 OF 2009 (P)
HASHIM YUSOFF, HELILIAH FCJJ AND SURIYADI JCA
1 SEPTEMBER 2010

Civil Procedure — Judgments and orders — Declaratory order — Application for — Whether akin to judicial review — Whether attempt to circumvent statutory provisions — Whether special circumstances warranted court's exercise of its jurisdiction

Labour Law — Trade union — Registration — Registration of trade union for workmen under s 12(1) of the Trade Unions Act 1959 — Whether registration null and void — Whether registration ought to be recognised

Statutory Interpretation — Construction of statutes — Exercise of statutory powers — Application for declaration that registration of trade union null and void — Whether application wrong — Whether appellant should have applied under s 71A of the Trade Unions Act 1959 — Whether statutory appeal procedure bar to judicial review or declaratory reliefs

The appellant commenced an action in the High Court over the registration of the second respondent as a trade union of workmen under s 12(1) of the Trade Unions Act 1959 ('Act 262'). The appellant refused to give recognition to the second respondent as a trade union because it was of the view that the second respondent represented casual workers who in law could not form a trade union. The appellant in the High Court had sought a declaration that the registration of the second defendant by the first defendant, the Director General of Trade Union ('DGTU') was null and void and a consequential order that the certificate of registration issued by the first respondent be revoked and cancelled. The High Court had dismissed the claim on the basis of a preliminary objection raised by the first respondent that the appellant was wrong in commencing the suit without first exhausting the remedy available under s 71A of Act 262. The decision had been subsequently affirmed by the Court of Appeal. Hence this appeal whereby two questions were posed for the determination of the court, inter alia: (i) whether s 71A of Act 262 applies to the employer; and (ii) whether the existence of a statutory appeal procedure/alternative remedy is a bar to judicial review or declaratory reliefs. In

so far as the first question is posed the court was concerned with the issue of the applicability of s 71A. The question was predicated on the premise that Act 262 has no relevance whatsoever to an employer. It is noted that while the Industrial Relations Act 1967 ('Act 177') and Act 262 are separate legislation the ensuing question was whether on the issue of a trade union, the employer is totally unconnected when on the facts of the appeal a dispute had arisen on account of the refusal of recognition. The appellant contended that the appellant did not fall within the scope of s 71A which referred to the availability of an appellate process.

Held, dismissing the appeal with costs:

(1) On the facts, pursuant to an application, the DGTU in allowing the second respondent to be registered as a trade union has made a 'decision' pursuant to an exercise of statutory powers. The claim for recognition is provided by legislation to be lodged in accordance with s 9(2) of Act 177. Based on the evidence there was a notice of claim for recognition in Form A that evoked a response from the appellant where the non-recognition was registered. The court observed that in so far as the legislation was concerned it cannot be categorically asserted that there is no nexus between the legislation. If the object of forming a trade union, inter alia, is to regulate relations between workmen and employers, then it cannot therefore be accepted unreservedly that Act 262 is not applicable to an employer (see paras 8–11).

(2) While the employer is not involved in the process of registration of a trade union it cannot be said that it has no application whatsoever to an employer. The very claim for recognition has an antecedent process of the registration of a trade union. The current state of law governing the relationship of employer and workmen for the purposes of a trade union activity is therefore found in both Acts 177 and 262. There is a nexus between the two Acts. Hence the word 'any person' as found in s 71A does extend and apply to an employer. In this appeal employer had challenged the very act of registration of the trade union. The first question was therefore to be answered in the affirmative (see paras 14–15).

(3) The declaratory orders sought by the appellant would have the effect of negating the decision of the first respondent. By praying for the declaratory orders the appellant was in effect appealing against the decision of the first respondent while a specific procedure has been laid down in the Act 262. By statute a second tier has been established whereby an appeal lies to the Minister. The word used in s 71A(1)(b) is 'may' which is construed to be permissive in relation to the person who is given the right to appeal. The declaratory orders applied for sought to reverse the decision of the registrar (see para 16).

(4) The appellant in praying for declaratory orders was in effect resorting to a procedure that is akin to judicial review. No manifest reasons may be discerned for invoking outrightly the exercise of the discretionary powers of the court. The ingenuity of circumventing the provisions of the available statutory procedure is further aggravated by two facts. Firstly, as has been pointed out by the learned High Court judge, it took six years before the action finally proceeded where it was also converted from an action that commenced as an originating summons to a writ action. Secondly, the trial judge had observed that no objection was lodged at the time the preliminary objection was raised. The courts should be vigilant in curbing the conduct of any party that resiles from a position that it has already taken. The Court of Appeal itself has observed that there are no special circumstances prevailing on the facts of this case to warrant the court to exercise its jurisdiction (see para 21).

(5) This court was also not being asked to pronounce whether a ministerial decision under s 71A of Act 262 would still preclude the court from exercising its discretion. Instead there appears to be a preemptive step resorted to as a substitute to a practical procedure laid down within the framework of the trade union legislation. The court agree with the finding of the Court of Appeal that the appellant has failed to establish in what way the statutory powers of the second respondent have been exceeded. The appellant requested the High Court to invoke its residual powers (see para 22).

(6) Even if the process invoked here had indeed been the process of judicial review in the true sense, this court will only be exercising a supervisory and not an appellate function. It was noted that the appellant was seeking to oppose a right recognised pursuant to art 10(1)(e) of the Federal Constitution and the mode of challenge to it had been provided by statute. In the absence of exceptional or appropriate circumstances the answer to the second question was in the affirmative (see paras 23–25); *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1 distinguished.

[Bahasa Malaysia summary

Perayu memulakan tindakan di Mahkamah Tinggi berikutan pendaftaran responden kedua sebagai kesatuan sekerja bagi pekerja-pekerja di bawah s 12(1) Akta Kesatuan Sekerja 1959 ('Akta 262'). Perayu menafikan untuk memberikan pengiktirafan kepada responden kedua sebagai kesatuan sekerja kerana ia berpendapat bahawa responden kedua mewakili pekerja-pekerja kasual yang di bawah undang-undang tidak boleh membentuk kesatuan sekerja. Perayu di Mahkamah Tinggi memohon deklarasi bahawa pendaftaran defendan kedua oleh defendan pertama, Ketua Pengarah Kesatuan Sekerja ('KPKS') adalah batal dan tidak sah dan perintah di bawahnya bahawa sijil

pendaftaran yang dikeluarkan oleh responden pertama dibatalkan. Mahkamah Tinggi menolak tuntutan tersebut atas alasan bantahan awalan yang dibangkitkan oleh responden pertama bahawa perayu salah di dalam memulakan guaman tanpa terlebih dahulu menggunakan remedi yang terdapat di bawah s 71A Akta 262. Keputusan tersebut telah kemudiannya disahkan oleh Mahkamah Rayuan. Maka rayuan ini di mana dua persoalan dikemukakan untuk diputuskan oleh mahkamah, antara lain: (i) sama ada s 71A Akta 262 terpakai kepada majikan; dan (ii) sama ada kewujudan prosedur rayuan statutori/remedi alternatif adalah halangan untuk semakan kehakiman atau relief deklarasi. Setakat yang berkaitan dengan persoalan pertama mahkamah mengambil berat dengan isu pemakaian s 71A. Persoalan tersebut adalah berdasarkan atas asas bahawa Akta 262 tidak mempunyai apa-apa kerelevanan kepada majikan. Ia diambil perhatian bahawa walaupun Akta Perhubungan Perusahaan 1967 ('Akta 177') dan Akta 262 adalah undang-undang yang berasingan persoalan yang dikemukakan adalah sama ada atas isu kesatuan sekerja, majikan tidak berkaitan langsung apabila di atas fakta rayuan suatu pertikaian telah berbangkit atas sebab penafian pengiktirafan. Perayu menghujah bahawa perayu tidak terangkum di dalam skop s 71A yang merujuk kepada kewujudan proses rayuan.

Diputuskan, menolak rayuan dengan kos:

(1) Di atas fakta, berikutan permohonan, KPKS dalam membenarkan responden kedua didaftarkan sebagai kesatuan sekerja telah membuat 'decision' berikutan pelaksanaan kuasa statutori. Tuntutan untuk pengiktirafan diperuntukkan oleh perundangan untuk dikemukakan menurut s 9(2) Akta 177. Berdasarkan keterangan terdapat notis tuntutan untuk pengiktirafan dalam Borang A yang membangkitkan jawapan daripada perayu di mana ketidakpengiktirafan telah didaftarkan. Mahkamah membuat pemerhatian bahawa setakat yang berkaitan dengan perundangan ia tidak boleh dinyatakan secara khusus bahawa tidak ada neksus di antara perundangan tersebut. Jika sebab untuk membentuk kesatuan sekerja, antara lain, adalah untuk mentadbir perhubungan di antara pekerja dan majikan, maka ia tidak boleh diterima tanpa keraguan bahawa Akta 262 tidak terpakai kepada majikan (lihat perenggan 8–11).

(2) Sementara pekerja tidak terlibat di dalam proses pendaftaran kesatuan sekerja ia tidak boleh dikatakan bahawa ia tidak mempunyai sebarang aplikasi kepada majikan. Tuntutan untuk pengiktirafan itu sendiri mempunyai proses anteseden untuk pendaftaran kesatuan sekerja. Keadaan undang-undang kini yang mentadbir perhubungan di antara pekerja dan majikan bagi tujuan aktiviti kesatuan sekerja oleh itu adalah diasaskan dalam kedua-dua Akta 177 dan 262. Terdapat neksus di antara kedua-dua Akta. Maka perkataan 'any person' yang terdapat di dalam s 71A sememangnya berlanjutan dan beraplikasi kepada majikan. Di

dalam rayuan ini majikan telah mencabar tindakan pendaftaran kesatuan sekerja itu sendiri. Persoalan pertama oleh itu dijawab secara mengiakan (*affirmative*) (lihat perenggan 14–15).

(3) Perintah deklarasi yang dipohon oleh perayu akan mempunyai kesan menidakkan keputusan responden pertama. Dengan memohon untuk perintah deklarasi perayu sebenarnya memohon terhadap keputusan responden pertama sementara prosedur spesifik terdapat di dalam Akta 262. Melalui statut, peringkat kedua telah ditubuhkan di mana rayuan boleh dibuat kepada Menteri. Perkataan yang digunakan di dalam s 71A(1)(b) adalah 'may' yang ditafsirkan sebagai permisif berkaitan dengan seseorang yang diberikan hak untuk merayu. Perintah deklarasi yang dipohon adalah untuk mengakas keputusan yang dibuat oleh pendaftar (lihat perenggan 16).

(4) Perayu dalam memohon untuk perintah deklarasi sebenarnya memilih suatu prosedur yang serupa dengan semakan kehakiman. Tidak ada alasan yang wajar yang boleh dicerap untuk membangkitkan secara nyata pelaksanaan kuasa budi bicara mahkamah. Kebijaksanaan memintasi peruntukan prosedur statutori yang terdapat selanjutnya diburukkan lagi oleh dua fakta. Pertama, seperti yang telah dinyatakan oleh hakim Mahkamah Tinggi yang bijaksana, ia mengambil masa selama enam tahun sebelum tindakan akhirnya diteruskan di mana ia juga ditukar daripada tindakan yang bermula sebagai saman pemula kepada tindakan writ. Kedua, hakim bicara juga telah memerhatikan bahawa tiada bantahan yang dikemukakan pada masa bantahan awal dibangkitkan. Mahkamah seharusnya berjaga-jaga dalam mengawal tindakan mana-mana pihak yang menyimpang daripada kedudukan yang ia telah pun ambil. Mahkamah Rayuan telah membuat pemerhatian bahawa tidak ada keadaan istimewa yang mengatasi di atas fakta kes ini untuk mewajarkan mahkamah melaksanakan bidang kuasanya (lihat perenggan 21).

(5) Mahkamah ini juga tidak diminta untuk mengisytiharkan sama ada keputusan Menteri di bawah s 71A Akta 262 akan masih menghalang mahkamah daripada melaksanakan budi bicaranya. Sebaliknya terdapat langkah ganti yang digunakan sebagai ganti kepada prosedur praktik yang dinyatakan di dalam rangka perundangan kesatuan sekerja. Mahkamah bersetuju dengan penemuan Mahkamah Rayuan bahawa perayu telah gagal untuk membuktikan bagaimana kuasa statutori responden kedua telah melampaui. Perayu meminta Mahkamah Tinggi membangkitkan kuasa bakinya (lihat perenggan 22).

(6) Walaupun proses yang dibangkitkan di sini sememangnya adalah proses semakan kehakiman, mahkamah ini hanya akan melaksanakan fungsi penyeliaan dan bukan rayuan. Adalah diperhatikan bahawa perayu memohon untuk membantah hak yang diiktiraf menurut perkara

10(1)(e) Perlembagaan Persekutuan dan cara mencabarnya telah diperuntukkan oleh statut. Dalam ketiadaan keadaan yang luar biasa atau wajar jawapan kepada persoalan kedua adalah secara mengiakan (*affirmative*) (lihat perenggan 23–25); *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1 dibeza.]

Notes

For cases on construction of statutes in general, see 11 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 1703–1907.

For cases on declatory order, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4540–4543.

For cases on registartion of trade union, see 8(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1766–1771.

Cases referred to

Barnes v Jarvis [1953] 1 WLR 649, QBD (folld)

Electrical Industry Workers Union v Registrar of Trade Unions & Anor [1976] 1 MLJ 177, HC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1, FC (distd)

Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor [1981] 2 MLJ 199, FC (refd)

Pinner v Everette [1969] 1 WLR 1266, HL (folld)

Preston, In re [1985] 1 AC 835, HL (refd)

R v Epping and Harlow General Commissioners, ex parte Goldstraw [1983] 3 All ER 257, QBD (refd)

Legislation referred to

Federal Constitution art 10(1)(e)
Industrial Relations Act 1967 s 9(2), (5)
Trade Unions Act 1959 ss 12(1), 71A, 71A(1), (1)(b)
Trade Union and Labour Relations (Consolidation) Act 1992 [UK]

Appeal from: Civil Appeal No P-01–72 of 2001 (Court of Appeal, Putrajaya)

Cyrus Das (Steven Thiru and Faisal Moideen with him) (Shook Lin & Bok) for the appellant.

Nizam Zakaria (Shamsul Bolhassan and Suzana Atan with him) (Senior Federal Counsel, Attorney General's Chambers) for the first respondent.

Subramaniam a/l Palayah (Hassan Subra & Associates) for the second respondent.

Heliliah FCJ (delivering judgment of the court):

[1] In this appeal, the two questions posed to this court are:

(i) Whether s 71A of Trade Unions Act 1959 (Act 262) applies to the employer?

(ii) Whether the existence of a statutory appeal procedure/alternative remedy is a bar to judicial review or declaratory reliefs?

[2] The facts as elucidated before the Court of Appeal are as follows. The Penang Turf Club (the appellant as the plaintiff), through one of its public officers initiated action in the High Court over the registration of the second respondent under s 12(1) of the Trade Unions Act 1959 (Act 262) as a trade union of workmen by the first respondent. The first respondent is the Director General of Trade Unions ('the DGTU') whilst the second respondent is the Penang Turf Club Race Day Worker's Union ('the workers union'). The second respondent was registered under s 12(1) of Act 262. The appellant refused to give recognition to the second respondent as a trade union because it was of the view that the second respondent represented casual workers who in law could not form a trade union.

[3] This appeal pertains to statutory interpretation as well as an exercise of discretion whereby the High Court judge has dismissed a claim on the basis of a preliminary objection raised by learned counsel for the first respondent that the appellant was wrong in commencing this suit without first exhausting the remedy available under s 71A of Act 262. The decision of the High Court has been affirmed by the Court of Appeal.

[4] The appellant in the High Court has sought a declaration that the registration of the second defendant (the second respondent) by the first defendant (the first respondent) on 22 November 1994 pursuant to s 12(1) of the Act is null and void and a consequential order that the certificate of registration issued by the first respondent be revoked and cancelled.

[5] We are reminded here not to dwell on the merits of the claim of the appellant in the suit before the High Court since the questions before us rest on the preliminary objection.

[6] In so far as the first question is posed before us we are concerned with the issue of the applicability of s 71A. The first question is predicated on the premise that Act 262 has no relevance whatsoever to an employer. It is asserted that the process of registration does not involve an employer since there is no

requirement of law that an employer is to be consulted or informed of the intended formation of a trade union that is likely to represent his employees. It is further contended that the employer is only brought into the picture when the newly registered trade union serves a claim for recognition pursuant to s 9(2) of the Industrial Relations Act 1967 (Act 177).

[7] It is noted that while Acts 177 and 262 are separate legislation the ensuing question is whether on the issue of a trade union, the employer is totally unconnected when on the facts of this appeal a dispute has arisen on account of the refusal of recognition. Learned counsel for the appellant has urged upon us that the appellant does not fall within the scope of s 71A which refers to the availability of an appellate process. This entails an appraisal of various provisions of the relevant legislation. Reference is first made to Act 262 the specific provisions of which are:

Trade Unions Act 1959

Interpretation

2(1) In this Act, unless the context otherwise requires or it is otherwise expressly provided —

'employer' means any person or body of persons, whether corporate or unincorporate, who employs a workman, and includes the Government and any statutory authority;

'trade dispute' means any dispute between an employer and his workmen which is connected with the employment or non-employment or the terms of employment or the conditions of work of any such workmen;

'trade union' or 'union' means any association or combination of workmen or employers, being workmen whose place of work is in Peninsular Malaysia, Sabah or Sarawak, as the case may be, or employers employing workmen in Peninsular Malaysia, Sabah or Sarawak, as the case may be —

...

(c) having among its objects one or more of the following objects:

(i) *the regulation of relations between workmen and employers* for the purposes of promoting good industrial relations between workmen and employers, improving the working conditions of workmen or enhancing their economic and social status, or increasing productivity;

(ia) the regulation of relations between workmen and workmen, or between employers and employers;

Section 12(1)

12(1) The Director General may, upon receiving any application under section 10, and subject to this section, register the trade union in the prescribed manner.

A Appeal to Minister

71A(1) Any person who is dissatisfied with any opinion, order, declaration, refusal, cancellation, withdrawal, direction or *decision*, as the case may be, given, made or effected by the Director General under any of the following provisions:

B ...

(b) section 12;

...

C may, within thirty days from the rate of the opinion, order, declaration, refusal, cancellation, withdrawal, direction or decision of the Director General, *appeal against the same to the Minister, in such manner as may be prescribed by regulations*.

...

(3) The Minister may, after considering any such appeal, give such decision thereon
D as he deems just and proper.

(4) A direction or decision of the Minister under this section shall be final and conclusive.

E **[8]** A perusal of the abovementioned provisions indicates that in the definition of a trade union there is envisaged that one of the objects of a trade union is the regulation of relations between 'workmen and employers' for the purposes of promoting good relations. In this case, pursuant to an application, the director general in allowing the second respondent to be registered as a
F trade union has made a 'decision' pursuant to an exercise of statutory powers.

[9] The questions posed are questions of law. In this appeal it has been disclosed that on 23 December 1994, the second respondent had forwarded to the appellant a notice of claim for recognition together with a certificate of
G registration dated 22 November 1994 issued by the first respondent. A letter dated 13 February 1995 was a reply by the appellant stating that it was unable to accord recognition to the second defendant. The claim for recognition is provided by legislation to be lodged in accordance with s 9(2) of Act 177 that states:

H

A trade union of workmen may serve on an employer or on a trade union of employers in writing in the prescribed form a claim for recognition in respect of the workmen or any class of workmen employed by such employer or by the member of such trade union of employers.

I

[10] According to the evidence before us there is a notice of claim for recognition in Form A dated 15 December 1994 that evoked a response dated 13 February 1995 from the appellant where the non-recognition was registered.

[11] At this juncture it would be appropriate to observe in so far as the legislation is concerned it cannot be categorically asserted that there is no nexus between the legislation. If the object of forming a trade union, inter alia, is to regulate relations between workmen and employers, then it cannot therefore be accepted unreservedly that Act 262 is not applicable to an employer.

[12] In *Pinner v Everette* [1969] 1 WLR 1266, Lord Reid observed:

> In determining the meaning of any word or phrase in a statute the first question to ask always is what is the natural or ordinary meaning of that word or *phrase in its context* in the statute. It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the Legislature that it is proper to look for some other possible meaning of the word or phrase.

[13] Related to the issue of statutory interpretation is the comment of Lord Goddard CJ in *Barnes v Jarvis* [1953] 1 WLR 649 at p 652:

> A certain amount of common sense (must be applied) in construing statutes.

[14] Applying the above tenets of interpretation to the legislation (Act 262) in this appeal, while the employer is not involved in the process of registration of a trade union it cannot be said however that it has no application whatsoever to an employer. The very claim for recognition has an antecedent process of the registration of a trade union. The current state of law governing the relationship of employer and workmen for the purposes of a trade union activity is therefore found in both Acts 177 and 262. There is a nexus between the two Acts. Perhaps the time is ripe for legislators to consider consolidating the two legislation, as has been evidenced by the inception of the Trade Union and Labour Relations (Consolidation) Act 1992 in the United Kingdom.

[15] Hence the word 'any person' as found in s 71A does extend and apply to an employer. In this appeal we have an employer that is challenging the very act of registration of the trade union. The first question is therefore to be answered in the affirmative.

[16] The second question could better be described as a consequence of the first question. Section 71A has provided a remedial mechanism within the framework of the trade union legislation, that is a specific procedure whereby an appeal lies to the Minister. The second question relates to another matter, that is since s 71A(1) is applicable to an employer does it still permit the employer to have an option not to appeal, and *additionally*, instead have recourse to a court of law in order to challenge the registration. The declaratory orders sought by the appellant would have the effect of negating the decision of the first respondent. By praying for the declaratory orders the appellant is in

effect appealing against the decision of the first respondent while a specific procedure has been laid down in the Act 262. By statute a second tier has been established whereby an appeal lies to the Minister. The word used in s 71A(1)(b) is 'may'. In construing the word 'may' generally, it could be contended that the word is permissive in relation to the person who is given the right to appeal in the sense that it gives the person a choice to prefer an appeal against the decision of the registrar or not to. But in relation to the person who is to be affected by the appeal we do not see this as directory. The declaratory orders sought seek to reverse the decision of the registrar. Hence in that sense if an employer wishes to refute recognition then it is the mandatory procedure that is laid down that has to be resorted to for the legislation has identified the specific procedure whereby any person who is dissatisfied is to seek further recourse with the Minister if that person wishes to negate the decision of the registrar.

[17] In our opinion the legislation by stipulating that the decision of the Minister is to be final is itself indicative that when there is already stipulated a second tier identified in the legislation, courts are not authorised to interfere for the statutory right that has accrued is not purely formal but mandatory. In other words the statutory right has to be exhausted.

[18] In filing this action, the appellant is seeking the court's intervention in what could be described as the intermediate stage.

[19] Certain observations may be made. In challenging the validity of the registration of the second respondent, the appellant is disputing, inter alia, questions of facts. Those facts are the very facts which the first respondent must have taken into consideration in arriving at a decision to register the second respondent. The basis upon which the existence of the second respondent as a trade union is being challenged is the nature of the relationship between the members of the trade union and the appellant and as asserted in the statement of claim 'the status of the workers'. There is therefore here an assertion of the status of the members of the trade union in relation to the appellant that becomes the main cause of seeking the declaratory orders.

[20] It is relevant for the purpose of this point to refer to the decision in *Pahang South Union Omnibus Co Bhd v Minister of Labour and Manpower & Anor* [1981] 2 MLJ 199. The judgment of the Federal Court then is instructive, despite the fact that in that case, the application made was for a certiorari to quash the decision of a Minister in the exercise of ministerial powers of the Minister pursuant to s 9(5) of the Industrial Relations Act 1967 as it was, prior to amendments made in 1980. Abdoolcader J (as he then was) stated:

... An appeal is the creature of statute and will only lie if a statute gives such a right and then only within the limits which the statute giving the right stipulates (*In re Bowman* (at p 633 per Swift J); (*Ohene Moore v Akesseh Tayee* (at p 75 per Lord Atkin)). No appeal lies from a decision of the first respondent under s 9(5). When no appeal lies from a decision, judicial review cannot be resorted to as an alter modus for an appeal by way of circumventing or repairing that omission. The scope of judicial review is narrower and limited and it would be useful and apposite to reproduce in extenso the delightfully lucid and comprehensive exposition on this aspect by Lord Denning MR, in *General Electric Co Ltd v Price Commission* (at p 12) when he stresses the supervisory nature of the jurisdiction:

Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final. At other times it says nothing about it. In all these cases the courts will not themselves take the place of the body to whom Parliament has entrusted the decision. The courts will not themselves make the original findings of fact. They will not themselves embark on a rehearing of the matter: see *Healey v Minister of Health*. But, nevertheless, the courts will, if called upon, act in a supervisory capacity. They will see that the decision-making body acts fairly: see *In re HK (an infant)*and *Reg v Gaming Board for Great Britain, Ex parte Benaim and Khaida*. The courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of words, the courts will decide it by declaring what is the correct interpretation: see *Punton v Ministry of Pensions and National Insurance*. And if the decision making body was gone wrong in its interpretation, they can set its order aside: see *Ashbridge Investments Ltd v Minister of Housing and Local Government* (I know of some expressions to the contrary, but they are not correct). If the decision making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere: see *Padfield v Minister of Agriculture, Fisheries and Food*. If the decision making body comes to its decision on no evidence or comes to an unreasonable finding — so unreasonable that a reasonable person would not have come to it — then again the courts will interfere: see *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*. If the decision making body goes outside its powers, or misconstrues the extent of its powers, then, too, the courts can interfere: see *Anisminic Ltd v Foreign Compensation Commission*. And, of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision will be set aside: see *Sydney Municipal Council v Campbell*. In exercising these powers, the courts will take into account any reason which the body may give for its decision. If it gives no reason — in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion, and act accordingly: see *Padfield*'s case.

We would further refer to the judgment of this court in *Minister of Labour and Manpower & Anor v Paterson Candy (Malaysia) Sdn Bhd* which also involved a trade union recognition dispute where the registrar of trade unions made the relevant inquiry and would advert to and apply the test and approach laid down therein (at p 124) and again that set out in the judgment of this court in *National Union of Hotel, Bar and Restaurant Workers v Minister of Labour and Manpower* (at p 191).

A The very point in issue in these proceedings in fact arose in *Foh Hup Omnibus Co Berhad v Minister of Labour and Manpower & Anor* when this court held that the first respondent had a complete discretion as to the manner in which he was to act in settling a dispute as to recognition of a trade union and that there had been no breach of the rules of natural justice.

B

[21] Again, it is also clear that that case was a proper case of judicial review for there was an allegation that a membership check carried out by the registrar of trade union was improper, wrong and contrary to the principles of natural justice. In the appeal before us, the appellant in praying for declaratory orders C is in effect resorting to a procedure that is akin to judicial review. No manifest reasons may be discerned for invoking outrightly the exercise of the discretionary powers of the court. The ingenuity of circumventing the provisions of the available statutory procedure is further aggravated by two D facts. Firstly, as has been pointed out by the learned High Court judge, it took six years before the action finally proceeded where it was also converted from an action that commenced as an originating summons to a writ action. Secondly, the trial judge had observed that no objection was lodged at the time the preliminary objection was raised. Courts should be vigilant in curbing the E conduct of any party that resiles from a position that it has already taken. The Court of Appeal itself has observed that there are no special circumstances prevailing on the facts of this case to warrant the court to exercise its jurisdiction.

F **[22]** In effect while two questions of law may have been posed to the court essentially there are also series of facts involved and which have not been materially considered by the courts below. Consequently in this appeal this court will not embark on a course of examining facts which have not been duly ventilated. By seeking the declaratory orders this court is being asked to G substitute its decision for that of the registrar of trade unions. In addition this court at this stage is also not being asked to pronounce whether a ministerial decision under s 71A of Act 262 would still preclude the court from exercising its discretion. Instead there appears to be a preemptive step resorted to as a substitute to a practical procedure laid down within the framework of the trade H union legislation. We agree with the finding of the Court of Appeal that the appellant has failed to establish in what way the statutory powers of the second respondent have been exceeded. The appellant requested the High Court to invoke its residual powers and as succinctly stated by Sir John Donaldson MR in *R v Epping and Harlow General Commissioners, ex parte Goldstraw* [1983] 3 I All ER 257:

> But it is a cardinal principle that, save in the most exceptional circumstances, that jurisdiction will not be exercised where other remedies were available and have not been used.

[23] Even if the process invoked here had indeed been the process of judicial review in the true sense, this court will only be exercising a supervisory and not an appellate function. Lord Templeman in his speech in *In re Preston* [1985] 1 AC 835 observed:

> Judicial review process should not be allowed to supplant the normal statutory appeal procedure.

[24] It is to be noted that the appellant is seeking to oppose a right recognised pursuant to art 10(1)(e) of the Federal Constitution and the mode of challenge to it has been provided by statute. The reliance upon the exhortation laid down in *Majlis Perbandaran Pulau Pinang v Syarikat Berkerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1 is clearly inapplicable on the facts of this appeal. In effect it is also clear that the appellant in this appeal, seeks in the words of Wan Suleiman FJ (as he then was) in *Electrical Industry Workers Union v Registrar of Trade Unions & Anor* [1976] 1 MLJ 177:

> to bypass the appointed tribunal seeking a declaration instead of following the prescribed statutory procedure.

[25] In the final analysis, in the absence of exceptional or appropriate circumstances the answer to the second question is in the affirmative. This appeal is therefore dismissed with costs and the deposit goes to the respondents.

Appeal dismissed with costs.

Reported by Mashrifah Ravendran